IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MO HAILONG, also known as Robert Mo, and MO YUN, Defendants.	Case No. 4:13-cr-00147 HEARING TRANSCRIPT

Courtroom, Fourth Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Thursday, February 26, 2015
1:40 p.m.

BEFORE: THE HONORABLE CELESTE F. BREMER, Magistrate Judge.

KELLI M. MULCAHY, CSR, RMR, CRR
United States Courthouse
123 East Walnut Street, Room 115
Des Moines, Iowa 50309

APPEARANCES:

For the Plaintiff:	JASON T. GRIESS, ESQ. MARC L. KRICKBAUM, ESQ. Assistant U.S. Attorneys U.S. Courthouse Annex 110 East Court Avenue, Suite 286 Des Moines, Iowa 50309-5053
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P R O C E E D I N G S

(In open court.)

THE COURT: Please be seated. Sorry I'm running late. I also have some new arrests for 2:30, if we can finish by then, and if we can't we'll just push those back, but just so you know.

And it's my understanding that we have Mr. Hailong on the phone, and so he's listening; is that right?

DEFENDANT MO HAILONG: Yes.

THE COURT: Okay. And, again, we don't have an interpreter, and I know in the past we've used an interpreter, but we were told that for purposes of today's hearing that's fine to proceed without an interpreter.

MR. WEINHARDT: Robert, this is Mark Weinhardt. You're okay to proceed without an interpreter today; is that correct?

DEFENDANT MO HAILONG: Yes, it's okay.

MR. WEINHARDT: Okay. Thank you.

And, Your Honor, if I can state for the Court that early in the case we did use an interpreter a couple of times, but our client's English has not presented any barriers or problems. He's lived in the United States since 1998, and so we don't think that's an issue.

THE COURT: All right. And, again, this is just a discovery motion, which is why I set it up without requiring defendants to be personally present. They're certainly welcome to, and it's open court.

We're here on the defendants' motion to compel. It was Mr. Hailong's motion and then it was joined by the co-defendant, although the co-defendant hasn't filed any separate papers other than joining in the motion.

So I've read your briefs. And I don't think you've filed anything like in the last 24 hours, have you? No?

MR. WEINHARDT: No.

MR. GRIESS: No, Your Honor.

THE COURT: Okay. That's good. All right. So who wants to argue for Defendant?

MR. WEINHARDT: Your Honor, I will argue this.

And, actually, what we anticipated was we would do two things today; one is to argue that part of the motion to compel that has been fully briefed, and the other is to tell the Court where we are by way of status on the rest of the motion to compel that was filed on December 15th. And we're prepared to have that conversation after we argue this part of the motion.

THE COURT: Either way is fine because that was on my list of things to talk to you about, so --

MR. WEINHARDT: I think we would like to argue the part that is fully briefed now and then talk about status after that.

THE COURT: All right. That's fine. Go ahead.

MR. WEINHARDT: Your Honor, I wanted to illustrate by a quick analogy where we believe we are with this motion. Imagine a garden variety drug case in which the prosecutor tells the defense, "I have a glassine packet, a plastic bag, containing crack cocaine, and your client's thumbprint is unmistakably on that bag. This is really good evidence that we're going to use to convict your client at trial."

And so the defense lawyer says, "Okay. Where did you get it? Did my client allegedly sell it to an informant? Did you get it through a consent search? Did you do a search warrant on my client's apartment? Did you do a search warrantlessly on my client's car? Where did you get it?"

And the Government says, "I'm not going to tell you where I got it, but it's really, really good evidence. And, oh, if you don't like the evidence, you can move to suppress it.

"Well, I'll move to suppress it when you tell me where you got it.

"No. Can't tell you where I got it. National security. You just can't know."

That's where we feel we are right now is that there are a number of items of evidence that are potentially extremely important to the Government's case, and we don't know where they got them, and they won't tell us.

To give the Court some flavor of what I'm talking about, there are intercepts, recorded conversations, that appear to be wiretaps or electronic intercepts of both our client's cell telephone and the cell telephone of another figure in the investigation, not our client's sister but somebody else.

In our client's case, over a period of a year and a half, there are 296 intercepted conversations. Now, I can tell you Mr. Mo used his cell phone more than 296 times in 18 months, and so we know that there had to have been lots of other recorded conversations. Those haven't been produced to us. We don't know where they are. We don't know who selected what was to be disclosed and what was not to be disclosed, but we've got these 296 conversations.

But there is no Title III application or order or anything like that that would authorize a wire intercept. I think early in the case we were told that there was never any Title III surveillance, nor is there any other sort of warrant or application or anything that would tell us how they got the recorded telephone conversations for either of these two individuals.

There are three different intercepts, bugs, if you will, that were placed in automobiles that recorded individuals speaking in automobiles. So important are some of these conversations that they were actually quoted in the indictment and in the superseding indictment in this case, and yet we've been given no actual notice of where or under what authority these conversations came.

There are 3,000 records in an e-mail extract for our client's Gmail account. We have no clear understanding of how it was that the Government got those, whether that is some sort of wire intercept, whether that was a warrant under the Foreign Intelligence Surveillance Act or what it was. We know it's there; it's been disclosed to us. We suspect that some of it is sought to be used in the Government's case in chief, but we have no idea where it came from.

We simply want, through this motion, to have the Government be required to tell us two things: One, what were the collection mechanisms or the bases of legal authority that they used in order to try to collect evidence of this sort; and, two, connect the individual items of evidence to those mechanisms.

Now, in most of the cases that's something that we're able to do on our own. In a conventional case, you can always do that. You have the search warrant, you have the search warrant return, you have subpoenas, and so forth, and so you have the paper trail to be able to connect the evidence that is produced to you to the collection mechanism. But in this case, we are in the dark for the things that I have described as well as some other evidence.

And in part that's also because the production of the search warrants themselves in this case have been piecemeal, it's been scattered. In some cases we have an application but we don't have the warrant. In some cases we have a warrant but no application. In some cases we have documents that appear to be prepared in draft form, but they're not signed, they're not filed.

So even the conventional search warrant part of the case has been very hard for us to track, so included in this motion we'd ask them to fill out the grid for the regular search warrants, but they have to also fill the grid for those collection mechanisms that are not conventional search warrants.

There are two sources of law that require the Government to do this. One is under Rule 12(b)(4)(B) of the Federal Rules of Criminal Procedure, and that rule says that in order to enable the defense to file a motion to suppress, the Government, on request, which we have requested, is required to give notice of its intent to use evidence that was secured through a search warrant. We have cited a number of cases that stand for that proposition.

I'll give the Court a chance. 12(b)(4)(B).

THE COURT: Thank you.

MR. WEINHARDT: So we cite several cases on this. If the Court wants to look at one case that I think is particularly illustrative of the situation that we find ourselves in, it would be the Anderson case from the D.C. District, where it was a white collar case, they seized 100 boxes of documents from an individual's home and from his office, and then just said, "Well, there's stuff in there, and we're going to use some of it at trial," and he asked the Government to be required to say what they're going to use at trial so he could properly frame a motion to suppress.

And the District of Columbia court there required that production or required that identification and particularly said, as I think every case we have cited, that an open file policy, as the Government has purportedly followed here, is not enough. They actually have to tell you what it is that they're going to use.

Now, the rule doesn't explicitly say that you have to connect it to the bases for collection, but that's because the rule anticipates the ordinary circumstance in which you have a search warrant inventory and so you can see without having to inquire of the Court or the Government like this where it came from.

In this instance, though, the rule only works if the Government is required to tell us where they got it. If they don't tell us where they got it, the rule is completely pointless. We have no idea how to move to suppress something if we don't know where it came from.

THE COURT: But isn't that -- ultimately doesn't the rule, Rule 12(b)(4)(B), require the Government to tell you what they're going to use as evidence in trial? So right now, when we're still in the kind of, well, "here's the world of discovery" universe, if the Government argues it's premature to require them to connect that up right now until they know what they're going to use at trial, are we jumping the gun here?

MR. WEINHARDT: I don't think that we're jumping the gun because we have a pretrial schedule of events, and that schedule requires us to file motions, pretrial motions, including motions to suppress, by March 27th. And so there's no way for us to comply with that deadline if the Government doesn't tell us what the evidence that's going to be used at trial is.

And, quite frankly, for our purposes, what's more important is just, for each fund of evidence, tell us where you got it. So for the 3,000 records in the Gmails, if they didn't tell us which ones they're going to use at trial, that's probably okay if they were all collected through the same legal authority and collection mechanism. Just tell us where you got those. For the 296 cell phone intercepts, you don't necessarily have to tell us which ones, but just tell us where you got those. That would be sufficient.

I would suspect that the Government could give us that answer in a day in less than one page. So we're not asking for the production of anything that we don't already have by way of evidence, and I don't think that we're asking for anything that's remotely burdensome. It's just a matter of they don't want to tell us.

Now, the other legal basis apart from that is the FISA statute itself. Now, this applies only to evidence that was derived through the FISA procedure. And there are other procedures. Of course, there is the conventional search warrant bucket; there is the Title III bucket, although I think we're told that bucket is empty; there is the subpoena bucket. But there are also, as we described in our brief, there is the executive order bucket, there's the FISA Amendments Act bucket. So there are several different buckets that evidence could be in, and they need to tell us what's in those buckets.

We do know that there is something in the FISA bucket because in each of our cases, ours and in Mo Yun's, they have filed literally a one-sentence notice to say there is something in the FISA bucket. Today they take the position they don't have to tell us what's in the bucket, they just have to tell us that the FISA bucket is not empty. That, we would submit, Your Honor, is a misreading of the FISA statute.

And if I may approach, Your Honor, that is maybe a larger quotation of what the Court's already looking at, but 1806(c) is the notice provision in FISA for a non-physical search. For physical searches under 1827, there's an exactly parallel provision.

But the threshold description of what that notice provision is talking about uses the word "any," but after that, it uses the words "that," "the," and "such." Each of those words used in context plainly require an identification; tell them the evidence that you are going to use, tell them such information that you are going to use, not just tell them generically that information is going to be used.

And so completely apart from Rule 12, it seems plain as day that FISA requires this. And neither in the Rule 12 case nor in the FISA case does the Government cite any case that comes within a country mile of saying that they're not obligated to tell us what common sense dictates and what I think the statutory text tells us that they have to provide.

They give examples from the statute where they say, "Well, the statute has other times where there are specific disclosure obligations," but this too would be a fourth, in addition to their three examples, a fourth specific disclosure obligation. And the three examples from the statute they give are all examples where the evidence is not necessarily being used in a proceeding.

This is the example where the evidence is being used in a proceeding, and where it is being used in a proceeding, the plain meaning of the statute that is in front of the Court right now means that the evidence has to be connected to the FISA procedure.

The Government even kind of gives it up at one point in the brief where they say, "Well, golly, we realize that the defense is kind of in a tough spot here and it's hard to frame their motions, and so forth," which is sort of like President Kennedy about saying who was going to go to Vietnam and who was not, saying, "Life is unfair."

Life may be unfair. The Federal Government, when it prosecutes a criminal defendant, is not allowed to be unfair, and it is unfair to stop us from learning the information that we need to know in order to get these motions properly framed. So that's the part where they have to connect it to the mechanism.

Now, the earlier part of the motion is they have to identify the mechanism in the first place. They can't just say, "Well, it came from a secret mechanism, not a conventional mechanism." They have to tell us what the mechanism is because each of the mechanisms has a different legal framework.

So, for example, I'm sure later on when we get to litigating FISA, which we will in this case, the Government will tell the Court about all of the ways in which the cards are stacked against the defendant in a FISA case. But there are some ways in which the defendant's got some advantages in FISA that the defendant doesn't have in a normal case.

In a normal search warrant challenge, the defendant has to have standing on his or her own. It has to be their own expectation of privacy that was violated. In FISA, on the other hand, if the defendant is a target or an aggrieved person, which means somebody who is being attacked or prosecuted through the use of FISA-derived evidence, even if it's not their own expectation of privacy, they still have standing to make a challenge.

THE COURT: Okay. And let me just ask, I guess my understanding from reading the briefs is the Government agrees that these defendants are aggrieved persons under FISA.

Is that true or am I making a leap that you haven't made?

MR. GRIESS: Judge, we've provided the notice that we're required to provide --

THE COURT: Okay.

MR. GRIESS: -- in that regard.

THE COURT: So you think these defendants are aggrieved persons as described?

MR. GRIESS: As set forth in the notice, that's correct.

THE COURT: Thank you.

MR. WEINHARDT: That's a useful concession but not one that I could have drawn as to every piece of FISA-derived evidence because, again, they haven't told us what they got through FISA. So I don't know whether they contend, I guess they now do, that Mr. Mo is an aggrieved person as to every piece of FISA-derived evidence or only some of it. You know, that's part of why we're in the dark.

The other thing that FISA requires is a demonstration of necessity; that is, that you had to use FISA because you couldn't use some conventional method of evidence collection.

The reason we need to know what mechanisms were used for each item of evidence is so we know --

(Interruption from telephone.)

THE COURT: Hang on a second.

MR. WEINHARDT: Robert, is that you? Can you mute your phone? It sounds like there's a medical beep going on in the background.

DEFENDANT MO HAILONG: Yeah. Medical beep.

MR. WEINHARDT: Okay. If you could mute your phone, that would be swell.

DEFENDANT MO HAILONG: I'm muting, but you can still hear something?

MR. WEINHARDT: Yes. We can certainly still hear you.

DEFENDANT MO HAILONG: Mute my phone? I'll cover the speaker to see if it works.

MR. WEINHARDT: Okay.

We can still hear it.

DEFENDANT MO HAILONG: Still hear it?

MR. WEINHARDT: Yeah.

DEFENDANT MO HAILONG: Okay. It's too loud? Let's see if it's too loud. Sorry about that.

THE COURT: Okay. And, again, Mr. Weinhardt can speak pretty loudly anyway.

MR. WEINHARDT: Right.

THE COURT: So just keep going.

MR. WEINHARDT: I'm willing to soldier on, Your Honor.

THE COURT: Okay.

MR. WEINHARDT: So because different mechanisms have different legal frameworks, we need to know what those are. The Government's response to this was, frankly, astonishing, where they say on the second page of their brief, "Neither the U.S. Attorney's Office nor the FBI personnel involved with this case are aware of any such evidence," that is, non-FISA collection mechanisms. "Should the U.S. Attorney's Office or the FBI personnel involved with this case become aware of such evidence, the Government will comply with its discovery obligations regarding such evidence."

That's not the standard. Neither prong of that is right. It's not right to say that things are only discoverable if the prosecutor or the FBI know about them. They're required to know about everything that is in their files, not just the things that they have subjective actual knowledge about in their files.

And it also is not right that they get to draw a brick wall between Des Moines and Washington, D.C. and say, "Well, we only need to tell you about the things that we know about here in Des Moines. If they know about it in Washington, D.C., we can ignore that." The rules of discovery, particularly constitutionally driven ones like Brady, cross those brick walls, and we described in our brief how Congress tried to tear down those barriers through recent legislation.

So they can't hide behind the fact that, "Well, other people were doing this part of the investigation." And, indeed, we'll say the suggestion that we get from especially reading the search warrant applications is that there were like two parallel investigations going on here; there's a national security-driven investigation that uses FISA and who knows what else, and then there is the conventional investigation that is more locally administered that uses conventional data collection methods. And we're not sure how much the two sides are talking to each other, but we're entitled to know about both of them.

We're certainly entitled to know about both of them in order to frame motions to suppress, but we're also entitled to know about them for all other purposes. So there are 296 cell phone conversations that have been disclosed to us. Somebody knows what is in the 297th one and the 298th one. We are entitled to know what that somebody knows.

THE COURT: All right. And for our other defendant, does anybody want to add anything or you're just joining?

MR. BIRD: We've joined, Your Honor.

THE COURT: Okay. All right. From the Government's perspective, let me just ask one question. I mean, typically, it's pretty straightforward if you have a search warrant, you know, the application and the return. Is that incomplete in this case? We don't have full sets?

MR. GRIESS: No, I don't believe it is, Your Honor. My understanding from talking to Mr. Weinhardt today, and we can discuss this in the second half of the discussion, is that there are still some inadequacies there with regard to the disclosure. I'm not sure what he's talking about and can't address it until we discuss it further, but that's not what we're talking about here today.

The mistaken premise that we started with here today that Mr. Weinhardt presented was the idea that this was a typical drug case, and it's not. In a typical drug case, we're going to disclose all the Rule 41 search warrants, all that information, and we have done that, by and large, again, with some exceptions, apparently, that we're going to discuss further.

But that is not what we have here. That's not how FISA works. Put simply, there is no legal authority whatsoever at all to do what the Court -- or what the defendant is asking the Court to do here in providing some sort of analysis or interpretation of the evidence that's been provided.

We have provided the notice that the FISA Act requires us to provide. We have done that. You know, no court has ever, to my knowledge, interpreted Rule 12(b)(4) or the FISA notice requirements to do what the defense is asking them to do. The

FISA Act is used every day all across this country, and no court has ever done what the defendant is asking the Court to do in this case.

There are specific rules that apply to FISA cases and where there's FISA evidence, and those -- a lot of those things have not yet occurred yet but will occur in the future.

THE COURT: And is that going to be the affidavit of the Attorney General?

MR. GRIESS: That's all part of the process. Once the motion to suppress has been filed, as the parties agreed in this case, then we can move forward.

What they're saying, what the defendant is saying, is, "No, no, no, before we file that motion to suppress, we want more evidence," and there is no legal authority which would require the Government to do so. We have made those disclosures to the defense, and so those are the courts -- the rules that we're required to abide by.

There are circumstances where Congress has said that there needs to be more notice, as we set forth in our brief, but none of those circumstances apply here. We have provided the notice we're required to provide and the information we're required to provide. They're asking for additional that we're just not required to provide, and so, Your Honor, the thing that needs to happen --

THE COURT: But are you prohibited from providing it?

MR. GRIESS: That's correct.

THE COURT: So you think not only does FISA not compel you to, it actually prohibits you from disclosing, basically, the information that the Court's going to get when it does its in camera review after the Attorney General's affidavit is filed?

MR. GRIESS: That's what I'm referring to, Your Honor, is the process that's going to take place in camera.

And just a couple of other things, Your Honor, that I wanted to address. We're aware of our discovery and notice obligations, and we will and always have and will continue to comply with them. The Government did not in any way, shape or form intend to suggest that we were walled off from different aspects of the Government as the defense suggests in his brief and again here today. That's not what we're saying.

THE COURT: Okay. I mean, that's how I read your brief too so --

MR. GRIESS: Well, I understand that, but that's not what we meant.

THE COURT: All right.

MR. GRIESS: Plain and simple, we did not intend to indicate that we were walling ourselves off from anyone in the case. We're aware of our discovery and notice obligations, we're going to continue to abide by them and meet them. This, the request being asked by the defense today, is outside of that. We ask the Court to deny the motion.

MR. BIRD: Your Honor, if I may.

THE COURT: Sure.

MR. BIRD: I'm Terry Bird on behalf of Mo Yun. And I apologize.

THE COURT: Right.

MR. BIRD: We are submitting it on Mr. Weinhardt's argument, but I did want to take this opportunity, since it's my first opportunity to be in front of Your Honor, to at least explain my client's position as it relates to this.

The superseding indictment names my client in six overt acts, all of which are alleged to have taken place in 2007 and 2008. Because of the nature of the conspiracy charge in this case, the FISA arguments that Mr. Weinhardt has made very much affect my client, notwithstanding the fact that the superseding indictment acknowledges that we were no longer -- my client was no longer employed at least as late as March of 2009, and I think the facts will show that it was actually earlier than that.

So notwithstanding the fact that we haven't joined -- done anything other than join, these rulings very much affect my client because she is being held responsible for things that happened in 2011, 2012, which were the subject of these FISA searches.

I just wanted to explain that to the Court as to what our position is today. Thank you.

THE COURT: All right.

MR. WEINHARDT: If I may speak for just a moment.

THE COURT: Mr. Weinhardt, yes.

MR. WEINHARDT: I wrote this down as a quote. Mr. Griess said, "Those are the rules that we are required to abide by," and then the Court said to Mr. Griess, "Do you mean you're prohibited from disclosing what the defense wants," and he says, "Yes."

He has to be reading from some internal set of DOJ rules that I've never seen. The Government cites no authority whatsoever for the propositions that he is saying in his brief. There is no -- he says that there is no case that says that we can get exactly what we have been asking for. He, of course, cites no case that says that we can't get it, and none of the cases that he cites regarding Rule 12 come within a country mile of saying that we can't get this. In fact, you know, they all in one way or another acknowledge that we can get what we're asking for.

The most important thing I think, Your Honor, is the text of 1806(c) itself. The plain reading of that means that we are entitled to find out what the evidence is that is subject to the FISA notice. There is no case, there is no rule, there is no statute that has been offered to the Court that says a one-sentence FISA notice that could talk about a lot of evidence or a little is okay. The statute says what it says, and that, I think, is what absolutely carries the day.

When we're told about the rules and we're told about the procedures, and so forth, those are not procedures that have been proffered to this Court nor that I'm able to look up on my computer.

THE COURT: All right. Well, I mean, it seems to me that some of the cases talk about the in camera inspection, in essence, resolving some of the issues that Defendant might not be able to more finely articulate, but once this AG's affidavit is filed, it triggers the in camera ex parte inspection.

And so I guess I'm not comfortable just letting that drift, and so what's the Government's thought on a deadline to have that happen?

MR. GRIESS: Your Honor, that process is triggered and is dealt with in the -- we've discussed it at length. I believe it's dealt with in the pretrial deadlines. As soon as the defendant files its motion to suppress, that triggers a 90-day window in which that process takes place. We're waiting right now for the defendant to file that motion to suppress.

THE COURT: And so, again, you think all the defendant has to do is say, "I move to suppress this because I think it should be suppressed"? I mean, "I don't really have a legal" --

MR. GRIESS: Yes.

THE COURT: -- "or factual basis, I just think it should be suppressed because it's evidence?"

MR. GRIESS: Yes.

THE COURT: And you think that's --

MR. GRIESS: That's the way it's done in every case, Your Honor, across the country.

THE COURT: All right. Well, this is my first one, so I have no standards.

MR. WEINHARDT: I don't know how DOJ litigates these things in other places. I know that if there were a rule or a doctrine that said that we can't know what we're suppressing or seeking to suppress when we file the motion, they would have something to cite to the Court that says that. This is really asking the Court to restrict us from knowing what evidence we're trying to suppress on the Government's say-so.

And also, to be clear, there is this issue of in camera inspection that is triggered when we file our motion, and Mr. Griess is right that we have to file our motion in order to trigger that. But we're not there yet. That's why much of their brief is premature and anticipatory. Before we even get there, we have to know what we're seeking to suppress. That's the only question before the Court today.

THE COURT: Well, and the Government says, "No, you don't need to know that. All you have to say is, 'I've heard that you have some FISA information, and I'd like you to suppress it.'"

MR. WEINHARDT: But how --

THE COURT: I know.

MR. WEINHARDT: I don't know, first of all, how I would be able to intelligently frame an argument, for example, about the necessity question if I don't know what evidence we're talking about. Some evidence can be procured some ways, some evidence can be procured other ways. So that's number one.

And secondly, how does the Government explain the way the statute is written? The statute language seems to be more than plain.

THE COURT: All right. Well, I'll take this under advisement based on the briefing that you've given me and my interpretation of the case law that I've reviewed and what you've cited.

Tell me where you think you are in the world of scheduling.

MR. WEINHARDT: Your Honor, let me talk a little bit generally about where we are with discovery because, as the Court knows, discovery has been extremely voluminous and unprecedentedly, in my experience in this district, slow.

So we have been in correspondence and discussions and meetings and phone calls with the Government at a pretty regular pace since August. When the case was exactly a year old, we filed our motion to compel, on December 15th.

I met with Mr. Griess and Mr. Krickbaum on January 6th, and we worked out an agreement that they would not need to resist that motion until the Government made what was represented to be the final, final production on January 31st. It turned out to be on the 30th because the 31st was a Saturday. And then the Court directed us to report to the Court by way of status of whether or not there are still issues, other than the one that we just argued, that need to be litigated yet.

It's taken us a long time in order to analyze that question because the January 30th production was very extensive, and so Mr. Beck and I have been working with some other folks in order to get our arms around it.

And to give the Court some idea, one of the issues with the production is that it has been, both before January 30th and January 30th itself, it has been very piecemeal. So with regard to a particular search warrant, different items -- the application, the warrant, there could be inventory and so forth -- will be in different places in different folders. None of it is Bates numbered.

So our best estimate is that in order to just put attachments together and group things the way they belonged, and so forth, took our team between 15 and 20 person-days from the production on January 30th up until now.

But we are now -- in the last two days, Mr. Beck and I have spent a fair amount of time figuring out where we are.

Where we believe we are is we don't think that the final, final January 30th production is, in fact, complete in a couple different respects.

First, there are things that we think the Government would agree that we're entitled to but we don't have even 14 months later. So I've talked about the incompleteness with regards to the search warrant applications. There has been, as we understand it, genetic testing that has been done in this case in an attempt to say this seed seized from a defendant connects back to this company or this gene pool, or whatever, and that has been around for a long time. It's referenced in warrant applications. None of that has ever been produced.

There are -- just as a matter of mechanics, there are gaps in reports, so a 302 will reference an attachment but the attachment isn't produced. And, as the Court will recall, we produced as Exhibit A to our motion to compel a chart or spreadsheet of what we thought all those gaps were. Some of them have been filled, some of them have not. The January 30th production produced a bunch of new gaps, and so our current gap chart is more than 100 items long.

We haven't had any evidence yet produced to us that the Government acquired from the seed companies, and there's a holdup about that in that we need to work out a protective order with the Government for that. We still don't have a draft of a protective order in order to negotiate or to put that together.

So those are the things we think the Government agrees about but we don't have them. Then there are things where I think the defense and the Government simply may not agree.

So, for example, it's going to be our position that any translations of the defendant's own statements from Mandarin to English in the Government's hands, whether drafts or preliminary, whatever they are, any translation of our client's statements in the Government's hands are produceable under Rule 16. I think we may take that position on co-conspirator statements as well, but certainly for our client's own statements, and I don't know that the Government agrees with that.

We have asked the Government to declare once and for all that we have all of the statements that our client has ever made, whether e-mail, documentary, oral or whatever, and we have not received that declaration, and I'm not sure whether the Government is prepared to do any of that.

There are other areas where we think there are just going to be some plain legal disputes between the parties, so I think that we are headed for further proceedings on this motion to compel. But Mr. Beck and I reached out to Mr. Krickbaum and Mr. Griess today in order to try to give the Court an orderly proposal for how to conduct that.

So here's what we would propose, and I think the Government is on board with this, is that we would give the

Government our plenary list of everything that we think is in issue; disputed, incomplete, whatever. We're prepared to do that by Monday.

The Government would have two weeks thereafter to produce whatever needs to be produced, respond that things aren't going to be produced, but to give its final position and final, final, final production on whatever is outstanding. And then whatever issues remain after we process that response, we would brief to the Court, and then the parties will just have to fight it out.

Not knowing how big that production is going to be, certainly January 30th was bigger than we had anticipated, we don't know how long it would take. We would ask for three weeks in order to brief that. If we're able to do it faster, we'll do it faster.

I would say I have two provisos about this deadline which I think we've calculated out now to March 16th. The first is it needs to be the entire Government that is responding and not just the local agents and local U.S. Attorney's Office, which now Mr. Griess says that's what we're going to get. But the Court can imagine how that phrase that I read sent a chill down our spine when we read that brief thinking that we were talking to only part of the Government.

The other thing is this case is now 14 months old. It will be 15 months old by the time this next deadline that we're proposing hits. We think enough is enough in terms of the time that it's taken to produce these things, and so anything produced after March 16th, and we're not asking the Court to decide, but we would reserve our right to seek sanctions for that production either by way of exclusion at trial or some other sanction. But we think that there needs to be a drop-dead that is serious and enforceable or this is just going to dribble on until our September 14th trial.

THE COURT: All right. What's the Government's thoughts in terms of a schedule?

MR. GRIESS: We agree with the schedule as put forth as far as the disclosure by Monday and then two weeks to respond to it.

THE COURT: All right. I guess what I'm concerned about is the easy stuff that we don't seem to have done, like, you know, a full search warrant application, affidavit, return, that part. You know, I think we have plenty of really hard issues to work on. I don't know why we have to spend any time working on the, you know, "where's the piece of paper" issues.

So what's our holdup there or --

MR. GRIESS: Well, Your Honor, you are asking me to respond to something I don't know about yet.

THE COURT: Okay. Well, I think you've had this chart.

MR. GRIESS: No, I don't.

THE COURT: Okay.

MR. GRIESS: Are you talking about Exhibit A from the previous motion?

THE COURT: Right.

MR. GRIESS: I have that and we complied with that. We provided that. If there are discrepancies or if there's something they don't think they have, which is what my understanding is, they'll provide that by Monday, and then we'll respond as fast as we possibly can. It is my belief that we've provided it all.

THE COURT: Okay. All right. So you don't think that there's any instances where they have, like, the search warrant return but not the warrant?

MR. GRIESS: I don't think so, Your Honor.

THE COURT: Okay.

MR. GRIESS: Because we tried to be very careful about that. But if I'm mistaken, we'll comply with that right away. That's what we want to see the list for, so that we can take care of it.

Now, with regard to some of the other issues, you know, like the signed versus the unsigned version, it's our understanding in certain jurisdictions, Illinois is one, that they don't provide signed versions. We get those from the court and we get unsigned copies that are stamped by the judge, and I think that's all we're going to be able to get. But, again, I don't know if that's the specific issue we're talking about.

Mr. Weinhardt and I spoke several times over these past few days where I've expressed to him, "Hey, let me know what the problems are, and we'll discuss it." It wasn't my intent to come in and discuss all this in open court, especially when I'm in the dark.

THE COURT: Okay. And, again, I'm just trying to anticipate how much time we need to budget to continue to work on some of just the mechanics in order to tee up the legal issue, such as do you get draft copies of statements or translations and things like that, so --

MR. GRIESS: Well, I can, you know, respond to the translations. This is something that was part of the original motion to compel. We discussed a resolution. We proposed a resolution. My guess is that they didn't like it because they said we're going to leave that out and we'll litigate that later. So I suspect that that's one we're just going to have to litigate.

THE COURT: All right. And, again, I'm just trying to get a handle on scope because I want to budget enough time for me to do my part of it and also to let Judge Rose know, you know, whether the work that we have to finish in -- you know, and we're now six months from trial. It's a lot of work that we need to cover.

I guess let me just put this out here: I understand that you've just -- that the Government's just taken the position that the Attorney General's affidavit doesn't get filed until there's a motion to suppress. The defendant's position is, "We can't possibly file a motion to suppress until we have a little bit better understanding of what was produced how," and the Government has said, "No, you're not going to be held to the having to have a factual or legal basis to file your motion to suppress," as you might think in other instances.

What prevents Defendant from filing a motion to suppress and saying, "I move to suppress all your FISA information because it must be wrong," and then get the AG's affidavit and then get the in camera ex parte inspection started?

Understanding that's not what you want because you want to sort it out yourself and you want to analyze it and compartmentalize your arguments, but that's assuming you're going to get that wish, and if you don't get that wish, the trial court still has to do the ex parte in camera inspection, and so that train could leave the station.

MR. WEINHARDT: Your Honor, we're working with all due speed to get the FISA motion on file, and we're not waiting, so the Court is clear, on the outcome of this motion in order to do that. So we do want to get that process started, but there will come a point when there's going to be a hearing on that motion, the Government's going to file a resistance, we're going to file a reply, and so forth. That process needs the information that we're seeking in this motion.

So even if we don't need it for the initial motion, I think we're entitled to have it regardless of timing, and certainly we're entitled to have it by the time the motion comes on for hearing.

THE COURT: Or at least you want it.

All right. Okay. Mr. Bird.

MR. BIRD: Thank you, Your Honor.

It's our understanding that -- and we just received more discovery in the last couple of days from the Government, but it's our understanding, and I think I heard Mr. Griess say today that he believes that we have received all the discovery that is due us.

So I just wanted to make it clear that we understand that all statements of my client, Mo Yun, have been received from the Government. That includes any oral statements or any excerpts or any written statements that the Government has in its possession. Because we have not received any since the original discovery that was provided to us. We keep waiting for others. There have been none. So my understanding is as of today that the Government is representing that it has provided all statements of my client, Mo Yun.

THE COURT: Okay. And, Mr. Griess, is that what you think the state of discovery is, that there --

MR. GRIESS: Your Honor, I'm not -- I believe so, but I'm not 100 percent sure. The discovery in this case is beyond voluminous, and we've provided everything as quickly as we can. I believe that is correct.

THE COURT: All right. So just, again, whatever was produced January 30th, which was the thought that that was going to be the final push on discovery, and recognizing that there may be a few trailing pieces of paper here or there, but in the Government's perspective, you don't have another data dump or push that's in the offing in order to clean up discovery; is that your thought?

MR. GRIESS: By and large, Your Honor. There is -- I should make clear there is some testing that's ongoing of the evidence, and the defense is aware of this and we've discussed it. We expect that to be complete by our deadline of disclosure of expert testimony on May 1. And, obviously, we'll disclose that as soon as we get it.

THE COURT: Is that this genetic testing?

MR. GRIESS: Correct.

THE COURT: Okay. But that's really an expert witness department. Defendant's statements or statements that are attributed to them or around them, that kind of material, it seems to me to be a defined set, and I'm asking, has that been produced?

MR. GRIESS: Yes.

MR. BIRD: Thank you, Your Honor.

MR. WEINHARDT: Can we get an answer to the same question for our client?

THE COURT: Okay. I mean, again, this is historic information, it's pre-indictment information that I'm talking about in terms of discovery.

And so, again, I'll ask the Government, is it your belief that statements from both of the defendants we have here for this case, that their statements have been produced?

MR. GRIESS: Your Honor, it's my belief that we have complied with our discovery obligations to the extent that we can at this point.

THE COURT: Well, that doesn't tell me anything. I mean --

MR. GRIESS: Well --

THE COURT: I mean, it tells me that you tried and but there still could be another giant, you know, chunk out there.

MR. GRIESS: Your Honor, the context of this case is one of FISA, and so outside of the process that you've talked about, we've discussed here, we believe we've made those disclosures.

THE COURT: Okay. And, again, I'm just trying to define the universe of what it is we're talking about. So under your FISA notice requirement, you've said we have certain information that was acquired through this statute and we're going to rely on it, and once Defendant moves to suppress that, you're actually going to produce it for ex parte in camera inspection. Whether Defendant gets a better index of that or a better feel for that, I'll sort that out.

However, under just plain old garden variety search warrants or Title III wiretaps, there is a way for defendants to find out do you have that kind of information so that came independently of whatever FISA umbrella you're tucking things under. So have you produced those kinds of defendant statements, whether they're straight-up interviews of defendant or a statement attributed to defendant outside of FISA?

MR. GRIESS: Your Honor, we have disclosed everything that we're required to disclose to this point.

THE COURT: Okay. We'll just work with that.

And I think it's going to take getting your motion to suppress on file, and I think I'll work through your briefs and arguments related to identification of the FISA source material or the FISA techniques and make a determination of whether, you know, Defendants get that more fine version of a table of contents.

And, again, I mean, I've got my eye on the calendar, and we're going to try to knit this all together in a pretty short period of time. So you'll make your list available to the Government by March 2nd. By March 16, they'll respond. And I hope you'll at least have a finite set of material that needs to be briefed for the remaining portion of the motion to compel.

And if we spill into April on that, the minute I get that issue joined, I'll get you a hearing and I'll get an opinion out as fast as I can so that I'm not the one holding up the show and you can, again, get material in the hands of your trial judge on this so she can start working on it, okay?

MR. BIRD: Thank you, Your Honor.

MR. WEINHARDT: Thank you, Your Honor.

THE COURT: All right.

MR. BECK: Your Honor, if I may add?

THE COURT: Sure.

MR. BECK: Mark Beck, also for Defendant Hailong Mo.

With regard to the subpoenas, the Court allowed for early returns on 17(c) subpoenas to Monsanto, Pioneer and AgReliant. We've had what I would characterize as meaningful meet-and-confer sessions with counsel for each of the companies on a number of sessions, a number of occasions.

Through this process, we've come up with return dates that are more realistic, frankly, for them, and just for the record, the current return date is, for Monsanto and for AgReliant, now set for March 3rd, the return date for Pioneer is now set for March 4th. Those companies will do what they must by that date in agreement of all parties.

THE COURT: All right. And so are you anticipating that there would be some objections or further requests for protective order or --

MR. BECK: I think, based upon discussions in the last couple of days, that we have narrowed the disagreement that the parties seem to have with regard to our entitlement to some of those materials, but that at least one of the companies, maybe all, may bring a motion to quash as to some aspect of the current subpoenas and may seek protective order for some aspects. We think that universe is smaller now. We were hoping to avoid burdening the Court at all, but that's not our call, and we'll know for sure in the coming days.

THE COURT: Okay. I mean, I appreciate the heads-up because, again, I'm just trying to budget time for you for this case so that we can move that portion along, again, with your motion to compel and information that the Government's holding.

Okay.

MR. GRIESS: Your Honor, we did have one final issue. We had previously submitted a list of deadlines that the parties agreed upon. Then there was the Court's order that came out on January 15th. There was one discrepancy between the order and the deadlines we agreed upon, and that had to do with the Government's response to the defense's subpoena -- excuse me -- motions which are to be filed on March 27th. The agreed upon deadline was our response, the Government response, by April 27th. We'd ask that the Court amend the order to reflect that agreement.

THE COURT: What, I put March 27th?

MR. GRIESS: Their pretrial motion date is March 27th. You put 14 days for our response. We had previously agreed that our response would be due on April 27th.

MR. WEINHARDT: Mr. Griess has correctly stated the agreement of the parties, and I, frankly, missed that the report didn't reflect that.

THE COURT: Okay. We'll fix that. That's fine.

MR. GRIESS: Thank you, Your Honor.

THE COURT: Okay. All right. Anything else we need to do?

MR. BECK: And, Your Honor, I should put on the record too my understanding that the Government has agreed that, as part of this effort to avoid truly burdening the Court with a debate over very broad but proper requests for materials that were served upon these companies, the better course would be to proceed in a more narrow fashion as we have to in turn see whether we can get some of the additional materials from the Government when they produce those company materials they have -- I think we're waiting for protective order there -- and that if we can't resolve these issues that way that we go back to the companies and seek what remains, but that in doing this it may be necessary to proceed with an additional 17(c) subpoena.

The reason for proceeding in this fashion is, frankly, not to burden those companies to have to go out and produce for us materials that they might already have given the Government in that when we get full discovery we may be able to moot the need to put the companies to that task. So we're not looking to have two bites at any apple but rather to take it in steps.

So we've narrowed our requests now to materials that the companies, of course, have that are easily gotten, in our view, and leaving the broader requests for potentially another day with an effort by all parties to try to narrow that.

THE COURT: Well, in this protective order that you're trying to work out that sounds like it will cover this, are the companies dealt in or is this something --

MR. BECK: Yes. Yes.

MR. WEINHARDT: Yes. And I mentioned that we're waiting on a draft of a protective order from the Government regarding the company information in the Government's hands. I should make clear I think Jason's had a draft on his desk for a long time, but there's been an attempt to coordinate with the companies, and we're not sure that everyone between the right hand and the left hand at these companies is talking to each other.

And so, you know, I think just getting a whole lot of lawyers to agree to something has been difficult, and, you know, our idea is if we can get it from the Government because the Government's already had it for a while, we'd do it that way rather than trying to burden the companies. We just need to try to get everybody on the same page about a protective order, or maybe we'll just have four separate ones, I don't know, but that's the goal.

THE COURT: Right. But I'm just trying to avoid having you and the Government get to some meeting of minds on a protective order and then the company say, "I can't work with that."

MR. GRIESS: Your Honor, I'm prepared to go in both directions. We have not been -- the Government has not been involved to any great extent in the subpoena discussion, and so my understanding is we're going to be dealt in a little bit more later this afternoon and going forward, and then we'll try and see where that takes us.

But we're prepared to go anywhere we need to go to obtain that protective order. The delay right now has to do with a negotiation between the parties on what's going on on the subpoenas and a desire to coordinate to the greatest extent possible.

THE COURT: All right. Well, let's just try to get some deadline so that I know that either that issue is resolved or that issue needs me to come up with a protective order. So can we give ourselves like three weeks to get that all ironed out?

MR. BECK: Well, we think we have a deadline that all parties acknowledge with regard to the productions sought in the subpoenas served upon the three companies, and those were the deadlines I mentioned a minute ago.

THE COURT: I thought that was they were going to respond, and their response could be, "I'm not going to give you anything."

MR. BECK: Well, no. Understood.

THE COURT: Okay.

MR. BECK: So that's the first deadline.

THE COURT: All right.

MR. BECK: And we think, frankly, that with regard to aspects of these requests, they're going to turn them over. With regard to other aspects, we believe there may be a motion to quash, so we'll duke that out in front of the Court.

With regard to those that require a protective order, we have taken the position that we're open to trying to put that in place, and the only disconnect, I think, has been a function of time in this case, that the protective order here that we're open to negotiating perhaps could be part of the protective order that the Government is discussing with the same companies, or perhaps it shouldn't be, depending on what's most efficient, but the lawyers we're dealing with may very well be new to any of this because upon service of the subpoena they have become involved, to our knowledge. Now, they may be long-time counsel, but it's unclear whether they are dealing with the other aspect, the Government-company relationship, that does date back a while.

We are trying to put all of them, all of them, together with the Government, and we're suggesting that when they ask for 302s and things, they ask the Government for those. So I think there's a good faith effort to put the right parties together in the last 2 weeks, 2 1/2 weeks since these subpoenas have been served, and we will get those protective orders in place or bring that to the attention of the Court, but I think we're going to get there.

THE COURT: All right. And, again, let's try to get there, like, in my lifetime is my point.

MR. BECK: Well, these are -- and, of course, these subpoenas are three weeks old or so, Your Honor.

THE COURT: Okay. And that's great. And so I'd say --

MR. BECK: We agree.

THE COURT: -- figure it out, and then I would hope by the end of March somebody could tell me that you're either stuck or you've got that one resolved.

MR. BECK: Absolutely. And I think on the subpoenas we're making faster progress and more progress than I anticipated. But there may be some subjects we'll need the Court's help on, but I don't think there will be delays associated with this process.

THE COURT: Okay. All right. Let me try to get this issue on the FISA notice under advisement and get an order out to you. I may file a motion to suppress just to get this AG's affidavit and then at least get this in Judge Rose's hands. So I'd like to get some discovery rolling here so we know what the heck we're doing and who's doing it because we are six months from trial so we need to pick up the pace.

Okay. All right. Anything else we need to do that I can help you with?

I'll fix that deadline for you, Mr. Griess. I didn't notice that.

MR. GRIESS: Thank you, Your Honor.

THE COURT: Anything else? No?

MR. WEINHARDT: Nothing else for us, Your Honor.

MR. SPIES: Thank you, Your Honor.

THE COURT: Okay. Thank you.

(Proceedings concluded at 2:43 p.m.)

C E R T I F I C A T E

I, Kelli M. Mulcahy, a Certified Shorthand Reporter of the State of Iowa and Federal Official Realtime Court Reporter in and for the United States District Court for the Southern District of Iowa, do hereby certify, pursuant to Title 28, United States Code, Section 753, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated at Des Moines, Iowa, this 8th day of March, 2015.

/s/ Kelli M. Mulcahy
Kelli M. Mulcahy, CSR No. 941, RMR, CRR
Federal Official Court Reporter